

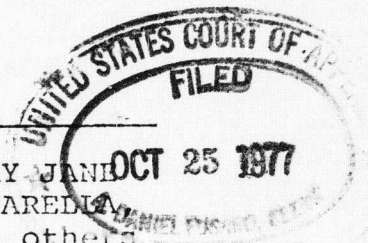
***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6072

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



DONNA LEARY, JAMES LEARY, BERNICE HENRIKSEN, MARY JANE WAGNER, CHARLES SMITH, FRANCES AGNELLO, JOSEPH PARELLA, WILLIE MATHIS, individually and on behalf of all others similarly situated; PHOENIX UNLIMITED, an unincorporated association,

Plaintiffs - Appellants,

-vs-

HETTY JEAN CRAPSEY, HAROLD A. SHAY, JAMES WHITE, JOHN J. PETROSSI, DWIGHT VAN DEVATE, THOMAS E. McGRATH, ROBERT D. WATERMAN, WILLIAM E. HANSON, Individually and in their Official Capacity as Commissioners of the Rochester-Genesee Regional Transportation Authority; JOHN GARRITY, Individually and in his official Capacity as Resident Manager of the Regional Transit Service, Inc.; WILLIAM T. COLEMAN, JR., individually and in his Capacity as Secretary of the United States Department of Transportation; ROBERT E. PATRICELLI, individually and in his Capacity as Administrator of the United States Urban Mass Transportation Administration; and their agents, employees, successors in office, assistants and all persons acting in concert or cooperation with them or at their direction or under their control,

Defendants - Appellees

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF

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CORPORATION

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ARGUMENT

POINT I: THE PLAINTIFFS HAVE STATED
CLAIMS WHICH ENTITLE THEM
TO RELIEF UNDER SECTION 504
OF THE REHABILITATION ACT.

There should now be little doubt that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, creates a private cause of action for mobility-handicapped individuals denied the use of the public transportation system. Lloyd v. Regional Transportation Authority, 548 F. 2d 1277 (7th Cir. 1977); United Handicapped Federation v. Andre, 558 F. 2d 413 (8th Cir. 1977)*; Bartels v. Biernat, 427 F. Supp 226 (E.D. Wis. 1977); Vanko v. Finley, No. C76-1305 (N.D. Ohio, September 28, 1977)**. See also, Kampmeier v. Nyquist, 553 F. 2d 296 (2d Cir. 1977). And notwithstanding the defendants' position below that Section 504 does not create a private cause of action, and the lower court's

* In attempting to distinguish Andre and the district court's first decision in Vanko v. Finley, defendants state that in both cases the courts rejected the notion that Section 504 or Section 16 require that every fixed-route bus be wheelchair-equipped. Plaintiffs do not disagree. Plaintiffs do not seek to compel the defendants to put ramps or lifts on all their buses - they merely seek a system which will provide them accessible public transportation. [A. 19-21].

** The most recent decision of the district court, filed September 28, 1977, is attached hereto.

apparent holding to that effect,* the defendants now appear to acknowledge that Section 504 does confer a private right of action.** The local defendants state, however, that "no handicapped person, including any of the plaintiffs-appellants herein is discriminated against... or is 'excluded from' the defendants' public transportation system." *** Such a claim, however, was implicitly rejected by the courts in Lloyd, Andre, and Bartels, and explicitly in Vanko (slip op. at p.6). Plaintiffs submit that the defendants' failure to provide them access to their transportation system constitutes "exclusion" and accordingly, plaintiffs are entitled to affirmative relief under Section 504.

If defendants are attempting to establish that they are not discriminating against the plaintiffs because they are not actively excluding them from utilizing the public transportation system, such a position is untenable and this approach to discrimination claims has been rejected by the courts. The Supreme Court of the United States has repeatedly condemned practices which, while facially-

* Actually, Judge Burke's decision makes no mention at all of Section 504 of the Rehabilitation Act. [A. 209-213].

** Federal defendants' Brief, p. 29.

*** Local defendants' Brief, p.29.

neutral or fair in form, are discriminatory in their operation. Thus, in construing the applicability of various civil rights statutes to allegedly discriminatory practices, courts must look to the effect of the challenged practices. In Lau v. Nichols, 414 U.S. 569 (1974), a case brought pursuant to Title VI of the Civil Rights Act of 1964,* (and a statute which Section 504 closely tracks**), the Court held that under civil rights statutes, "discrimination is barred which has that effect even though no purposeful design is present." Id. at 569. See also, Griggs v. Duke Power Company, 401 U.S. 427, 433 (1971) (construing Title VII of the Civil Rights Act of 1964***).

In Vanko v. Finley, supra, the district court, while ultimately holding in favor of the defendants, explicitly stated that Section 504 bars discrimination against the mobility handicapped and mandates that significant, affirmative steps be taken to assure that the handicapped are not excluded from the public transportation system. "Vague plans for the indefinite future and second-rate transit for the mobility handicapped will not satisfy the mandate of these federal laws..." (slip op. at p.6). Thus, the

* 42 U.S.C. §2000d, et seq.

** See Appellants' Brief, p.6

*** 42 U.S.C. §2000e, et seq.

defendants were found to be under an obligation imposed by Section 504 to effectuate a comparable system of mass transit for the mobility-handicapped.

So too, in this case the effects and consequences of the defendants' failure to plan for and provide an accessible public transportation system for the plaintiffs has operated as an exclusion, in contravention of Section 504.* Moreover, defendants have demonstrated none of the affirmative steps contemplated in Vanko to remedy their discriminatory and exclusionary transportation practice. Accordingly, defendants have an obligation, pursuant to Section 504, to provide plaintiffs with an accessible transportation system.

* Even if the courts may look to Section 16 of the Urban Mass Transportation Act (UMTA) and its implementing regulations to determine appropriate relief under Section 504 of the Rehabilitation Act, there is no support in the legislative history of Section 504 for any suggestion by the defendants that Section 504 is restricted in scope by Section 16 of UMTA. Section 504 has been in existence since 1973, and defendants have been under an obligation to eliminate exclusionary practices since that time. The prolonged and inexcusable delay of the federal government in promulgating regulations and issuing standards certainly cannot now serve to deprive the plaintiffs of the protections to which they are entitled under the Rehabilitation Act.

POINT II: THE PLAINTIFFS HAVE STATED
CLAIMS PURSUANT TO SECTION
16 OF THE URBAN MASS TRANS-
PORTATION ACT WHICH REQUIRE
A FACT-FINDING HEARING.

The plaintiffs also alleged in their complaint that the defendants violated the provisions of Section 16 of the Urban Mass Transportation Act, 49 U.S.C. §1612, (hereinafter UMTA) by not making statutorily-mandated "special efforts" to provide a transportation system which is accessible to mobility-handicapped residents of Monroe County. The lower court, in language closely paralleling the defendants' motions to dismiss, concluded that the defendants were entitled to summary judgment dismissing the action because neither Section 16 of UMTA, nor any other statute, created a private right of action, and that in any event, the local defendants had fully complied with all the requirements of the Act. [A. 210-213]. Judge Burke's decision contains no analysis of or reference to the "special efforts" requirements of Section 16 of UMTA or the applicability of the regulations promulgated thereunder, or what efforts, if any, defendants had undertaken.

The court in Vanko v. Finley, supra, determined that Section 16 required the defendants to demonstrate substantial, good faith progress in both the planning and implementation of a transit program for the mobility-handicapped which would

be comparable to that provided the general public. In Vanko, the court looked to the UMTA regulations on urban transportation assistance and standards for general direction concerning what activities would constitute "special efforts" toward comparable service.* Appendix B to 23 C.F.R. §450, Subpart A, states, in pertinent part:

"With regard to transportation for wheelchair users and others who cannot negotiate steps, 'special efforts' in planning means genuine,

* To the extent that the local defendants claim that the plaintiffs are not entitled to relief because there were no applicable regulations implementing Section 16 of UMTA at the time the first application was approved (Local defendants' Brief, pp.25-28) such a notion was explicitly rejected in United Handicapped Federation v. Andre, supra, and Lloyd v. Regional Transportation Authority, supra. Moreover, the failure of the federal defendants to implement regulations to a statute enacted in 1964 cannot defeat the plaintiff's right to relief herein. While the federal defendants attempt to depict a picture of a calculated step-by-step approach as exemplifying their "special efforts", it can more appropriately be viewed as inexcusable, prolonged delay rather than long-term planning.

To the extent that the federal defendants adopt the opposite position and attempt to distinguish Lloyd on the grounds that Judge Burke was fully briefed on and familiar with the applicable UMTA regulations, which were not available to the lower court in Lloyd (Federal defendants' Brief, p.27), such argument ignores the requirements set forth in Lloyd and Andre that the lower court scrutinize the special efforts in light of the applicable regulations. In this case, Judge Burke engaged in no detailed analysis of the purported special efforts or the regulations.

good-faith progress in planning service for wheelchair users and semi-ambulatory handicapped persons that is reasonable by comparison with the service provided to the general public and that meets a significant fraction of the actual transportation needs of such persons within a reasonable time period".

An analysis of the defendants' list of purported "special efforts" reveals that they have not even met the standards outlined in the regulations. The defendants have not begun to provide the plaintiffs with comparable transportation service. Almost, if not all, their efforts have been directed at improving the design of their non-accessible buses. Efforts to provide special grab rails, better lights to ease access, and the reserving of seats for the elderly and handicapped cannot be deemed to benefit the mobility-handicapped, who cannot board the buses in the first place. The regulations cited above require "genuine, good-faith progress in planning for wheelchair users...that is reasonable by comparison with the service provided to the general public." None of the defendants' cited efforts meet this standard. In fact, the only effort which could arguably approach being a special effort on behalf of wheelchair users is the limited dial-a-ride demonstration project, conducted pursuant to

49 U.S.C. §1605. But in operating this demonstration project, the local defendants are essentially running an experiment for the federal defendants, and are not doing their own transportation planning. The project serves none of the plaintiffs, and in fact, is expected to expire on October 28, 1977. Such a project cannot be realistically viewed as a commitment to meeting the transportation needs of the mobility-handicapped.

Indeed, while the local defendants allude to their pending application's request for five small buses (presumably equipped for wheelchairs), such request was later withdrawn. [A. 118]. If anything, the withdrawal of their request for a mere five small buses underscores the policy of the local defendants not to expand or change their service so as to provide for the needs of the handicapped. Moreover, the local defendants' Transportation Improvement Program, submitted with their pending application to UMTA, makes no mention of meeting the needs of the handicapped. [A. 106-117]. Finally, the defendants meet none of the three alternative examples set forth in the UMTA regulations^{*}, which are presumed by UMTA to satisfy the "special efforts"

^{*} 49 C.F.R. §§613.200 - 613.204, Appendix to Subpart B.

requirements with respect to wheelchair users.

"Special efforts" cannot be meaningfully evaluated in a vacuum. The affidavits and exhibits annexed to the defendants' moving papers constitute a recitation of what they claim to have done, without any analysis of whether they meet the requirements under the regulations or the needs of the handicapped community. The plaintiffs, on the other hand, have been denied, through the granting of summary judgment, the opportunity to present their own proof and expert testimony about their needs. They also have been prevented from undertaking discovery to determine the scope of defendants' planning efforts, if any, the monetary aspects of implementing an accessible system, transportation patterns, population, or what demographic or other studies, if any, defendants have conducted to even determine where the handicapped reside in Monroe County. All of this information is crucial in order to adequately assess whether the actions enumerated by the defendants meet the "special efforts" requirements in the context of the needs and resources of this particular community. Surely such important factual issues cannot simply be summarily resolved without any testimony.

The local defendants have emphasized that their special efforts at planning for the needs of the physically

handicapped were undertaken by the RGRTA's Transportation Committee for the Elderly and Handicapped. Actually, a review of that Committee's minutes [A123-A170] demonstrates that virtually no planning for the transportation needs of the handicapped ever took place in those Committee meetings.

This Committee had been in existence since January 1972, purportedly "to investigate the needs of the elderly and handicapped" [A120], yet despite the fact that at the Committee's second meeting, on March 1, 1973, the members were told that the RGRTA had "no alternative but to include the needs of the elderly and the handicapped within the framework of service and facilities provided to the general public," [A125] and despite the fact that at the Committee meeting on March 22, 1973 it was recognized that research would be required to determine the identity, location, and transportation needs of the physically handicapped, no such investigation was ever begun prior to the commencement of this action.

More significantly, the Committee minutes reveal that the Committee never had any real role in any planning activity, and, as alleged by plaintiff Donna Leary [A177-A180], it merely received reports of decisions affecting the elderly and handicapped already made by the local

defendants. As an example, during the entire life of this Committee the pending UMTA applications for the purchase of new vehicles were never mentioned and the Committee's suggestions for design features for those buses to meet the needs of elderly and handicapped passengers were never solicited. In fact the only mention of these vehicles was an announcement that the buses had recently been purchased [A152].

Aside from a test ride by Committee members [A145-A146] of the first vehicle already purchased for the dial-a-ride service, there was absolutely no consideration by the Committee of bus design features or transit systems intended to meet the needs of the handicapped passenger.

The most important decisions made by the Committee were to change the designation on a passenger identification card from "handicapped fare" to "special fare" [A157, A163] and to recommend the change in the location of one bus stop on the fixed route system. [A164, A170]. Surely, such minimal achievements are not the "special efforts in planning" contemplated by Section 16 of the Act.

In light of all these disputed and undeveloped material issues of fact, and the defendants' failure to comply with any of the applicable UMTA regulations, the plaintiffs are clearly entitled to have the case remanded for trial.

The Eight Circuit reached such a result in United Federation v. Andre, supra. "After reviewing the Seventh Circuit's reversal in the Lloyd case we find we must remand to the district court for reconsideration of defendants' duties under the statutes and administrative regulations and guidelines." Id., at 415. The same result should be reached by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the district court, granting summary judgment to the defendants, should be reversed and this case remanded.

Respectfully Submitted,

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U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PETER VANKO	)	C76-1305
	)	
Plaintiff	)	Judge Thomas
	)	
v.	)	
	)	
DALE R. FINLEY, et al.)	)	
	)	
Defendants	)	

MEMORANDUM AND ORDER

In a memorandum and order dated June 1, 1977, this court reserved ruling on the defendants' motions to dismiss or for summary judgment pending further briefing and augmentation of the record. The parties have submitted the additional briefs and documentary evidence requested by the court, and on the basis of this additional material, defendants' motions, treated as motions for summary judgment, are now granted.

The factual and jurisdictional posture of this case are detailed in the court's June 1, 1977 memorandum and order. In brief summary, the plaintiff, Peter Vanko, alleges that

the federal¹ and local defendants² have denied him and other similarly situated "mobility handicapped" individuals within Cuyahoga County access to transportation facilities provided by the Greater Cleveland Regional Transit Authority ("RTA") in violation of various federal statutory and constitutional provisions. In its June 1 order, the court rejected plaintiff's claims based upon the Department of Transportation and Related Agencies Act of 1975, Pub. L. No. 93-391, 88 Stat. 769 (1974) and various constitutional provisions. The court also rejected plaintiff's argument that either section 16(a) of the Urban Mass Transportation Act of 1964, 49 U.S.C. §1612(a) or section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 require that "all transit rolling stock and facilities [must be able to be] effectively utilized by all mobile disabled and elderly people."³

1. The federal defendants named in the complaint are former Secretary of Transportation William T. Coleman, Jr. and Robert Patricelli, the former administrator of the United States Urban Mass Transportation Administration, and their successors in office.

2. The local defendants sued by plaintiff are the members of RTA's board of directors.

3. Despite this ruling by the court, the plaintiff still argues in his supplemental brief that all new rolling stock purchased by RTA must be totally accessible to the mobility handicapped. The court therefore reaffirms its holding that no provision of the Constitution, the applicable statutes, or the regulations of any federal department or agency require total accessibility at this time. In his May 19, 1977 order, Secretary of Transportation Brock Adams rejected any requirement of immediate conformity with the "Transbus" prototype specifications, since such fully-accessible buses are at the present time commercially unavailable. See n. 2 of this court's June 1, 1977 memorandum and order.

Despite the fact that the court rejected any requirement that "all RTA rolling stock must be "totally accessible", it nevertheless refused to grant judgment at that time for the defendants. The court instead posed three questions to the parties for further briefing and augmentation of the record:

1. Do the applicable federal statutory provisions (49 U.S.C. §1612(a) and 29 U.S.C. §794) require that RTA provide service for the elderly and handicapped "that is reasonable by comparison with the service provided to the general public?"

2. What should the scope of this court's review be if it determines that some form of comparability is required between mass transit services for the handicapped and the general public?

3. If such comparability is required, is the RTA in fact meeting such requirement?

The questions will now be considered.⁴

A.

The formulation of this court's first question in terms of whether transit service for the handicapped and the elderly must be "reasonable by comparison with the service provided to the general public" stems from the joint Federal

4. The June 21, 1977 vacation and remand by the Eighth Circuit Court of Appeals of United Handicapped Federation v. Andre, 409 F.Supp. 1297 (D. Minn. 1976) adds further support to the court's decision to put these questions to the parties in this case. This court reads the Andre remand to require a factual analysis of local transportation programs for the mobility handicapped in light of the applicable federal regulations, a factual analysis similar to that undertaken in this opinion.

Highway Administration and Urban Mass Transportation

Administration regulations on urban transportation planning assistance and standards. Appendix B to 23 C.F.R. §450,

Subpart A. The federal defendants are correct, however, that this language must be read in the context of the appendix's complete definition of the "special efforts" for the handicapped and elderly which 49 U.S.C. §1612(a) requires. 5

This definition is set forth in the fourth section of Appendix B:

4. Special efforts, urban transportation planning process. The urban transportation planning process must include special efforts to plan public mass transportation facilities and service that can effectively be utilized by elderly and handicapped persons. As used in this guidance, the term "special efforts" refers both to service for elderly and handicapped persons in general and specifically to service for wheelchair users and semiambulatory persons. With regard to transportation for wheelchair users and others who cannot negotiate steps, "special efforts" in planning means genuine, good-faith progress in planning service for wheelchair users and semi-ambulatory handicapped persons that is reasonable by comparison with the service provided to the general public and that meets a significant fraction of the actual transportation needs of such persons within a reasonable time period. Particular attention should be given to those handicapped persons who are employed or for whom the lack of adequate transportation constitutes the major barrier to employment or job training.

5. 49 U.S.C. §1612(a) itself provides:

It is hereby declared to be the national policy that elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services; that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured; and that all Federal programs offering assistance in the field of mass transportation (including the programs under this chapter) should contain provisions implementing this policy.

The UMTA's own regulations neither require total accessibility to mass transportation facilities for the elderly and handicapped, nor do they require even immediately comparable service for this group of people. Appendix B instead speaks of "genuine, good-faith progress" in attaining comparability. The court concludes and determines, as the federal defendants argue, that the UMTA's definition of section 16(a)'s requirement of "special efforts" contemplates "an orderly, planned process by which steps will be taken to establish transportation service for wheelchair users and other semiambulatory persons that is reasonable by comparison with the service provided to the general public."⁶

This court's interpretation of the UMTA regulation and of the requirement of 49 U.S.C. §1612(a) is the same as that reached by the only court to date which has decided a section 16(a) suit against the governmental defendants on the merits. Bartels v. Biernat, 427 F.Supp. 226, 233 (E.D. Wis. 1977):

The regulations do not require a full and immediate solution to the problem. What they do require is that the planning process show that special efforts are being taken to ensure that the mobility handicapped will be provided with services equivalent to the rest of the community.

6. This "orderly, planned process" toward the establishment of mass transit comparability is detailed in 49 C.F.R. §613.204 and the appendix thereto.

See also Young v. Coleman, Civil No. H-76-201 (D. Conn. Dec. 17, 1976).

The court also concludes that section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, does not require the immediate establishment of services comparable to those provided the general public. Instead, this section's prohibition of discrimination against the handicapped can be satisfied by the same substantial good faith progress in both the planning and implementation of transit programs for the mobility handicapped that is sufficient for the purposes of the Urban Mass Transportation Act of 1964 and the regulations thereunder. Vague plans for the indefinite future and second-rate transit for the mobility handicapped will not satisfy the mandate of these federal laws, but instantaneous conversion to a transportation system that is comparable in every minute detail is not required either. The answer to the first question posed by the court is therefore that comparability is, in fact, required by applicable federal law, but that local transit authorities have an interim time period in which to design, plan for, and effectuate such a comparable system of mass transit for the mobility handicapped.

B.

The second question posed by this court in its June 1 memorandum and opinion can be answered briefly. The scope

of review that this court must apply to the federal action challenged in this case is found in section 706 of the Administrative Procedure Act, 5 U.S.C. 5706. 5 U.S.C. 5706(2) (A) provides that this court shall "hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The Supreme Court has said of review under section 706(2) (A) that:

Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). See also Kendler v. Wirtz, 388 F.2d 331, (3d Cir. 1968) and Pullman, Inc. v. Volpe, 337 F.Supp. 432 (E.D. Pa. 1971) for examples of the limited judicial review over decisions challenged under sections of the Urban Mass Transportation Act other than section 16(a).

Plaintiff challenges not only the UMTA grant to RTA as being "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," but also contends that the UMTA regulations under which this grant was approved are themselves "not in accordance with law" since they do not require immediate comparability or total accessibility. The legality of the UMTA approval of RTA's grant application will be considered in part C of this opinion. The validity of the UMTA regulations themselves, however, has already been articulated in the court's memorandum of June 1 and in

part A of this opinion, wherein it was found that the Urban Mass Transportation Act of 1964 and the Rehabilitation Act of 1973 do not require either immediate comparability or total accessibility. The challenged regulations are therefore "in accordance with law," since they require no less than do the statutes upon which they are based.⁷

C.

In order to determine whether RTA is meeting its obligation to undertake "special efforts" for the provision of effective mass transit facilities for the mobility handicapped, it is necessary to set forth exactly what services RTA is now providing for the handicapped and what services it plans to provide in the near future. RTA calls these special services Community Responsive Transit (CRT). The Community Responsive Transit program is best summarized in the federal defendants' brief:

The separate system being developed by RTA [CRT] is designed to meet the needs of all elderly and handicapped persons in the service area. There will be two types of service: one which will operate county-wide during peak-hours and which will enable those whose handicaps keep them from using regular transit services to reach destinations relating to employment, education, therapy, etc.; and one operating from 9:00 a.m. to 5:00 p.m. during weekdays and from 8:30 a.m. to 3:00 p.m.

7. See also the Supreme Court's statement in Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 194 (1941) regarding the judicial deference due another administrative agency:

Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.

on Sundays serving the intracommunity needs of the elderly and handicapped (i.e., shopping, medical visits, social visits, clubs and other activities). Both types of service will operate door-to-door, providing passengers with personalized, comfortable and secure means of meeting their transportation needs. No fares will be charged during off-peak hours, and only half-fares will be charged during peak hours.

The 9:00 a.m. to 5:00 p.m. intracommunity service was discussed in the original briefs filed in this case and is currently in effect throughout Cuyahoga County. "Extra Lift," the county-wide peak-hour service for the severely handicapped (primarily the wheelchair confined) has not yet been implemented and was not fully described in the earlier submissions of the defendants. PTA plans to inaugurate Extra Lift this fall when fifteen lift-equipped compact buses are delivered to it.⁸ A draft of the Transportation Improvement Program for Northeastern Ohio, submitted as an appendix to the brief of the federal defendants, shows that RTA anticipates federal funding to purchase ninety-eight compact buses (forty-three of which will be lift-equipped) over the next five fiscal years. These buses are in addition to the thirty-four vehicles currently in CRT service and the thirty vehicles which are slated for CRT service in the UMTA grant at issue in this suit. In addition to this rolling stock, RTA anticipates spending additional funds on other capital items for the CRT program and estimates that the first year's

⁸ These fifteen buses will be financed by an appropriation contained in the UMTA grant to RTA which is challenged in this lawsuit.

operation of the intracommunity aspect of CRT will cost approximately one million dollars while Extra Lift will cost an additional \$500,000 in operating expenses for its first year of service.

Since the Extra Lift program will not have its full complement of lift-equipped buses until fiscal year 1982, priorities have been established by RTA to determine the ridership under this program. The priorities for trip purpose are, in descending order of priority, trips to work, to college or vocational training, to other training, and, finally, trips for other purposes.⁹ Priority is also given to the wheelchair confined and for regularly scheduled trips for at least a three-month period. As with the intracommunity aspect of CRT, Extra Lift service will be from curb to curb, although passengers will be charged one-half of the regular RTA fare (12 1/2 cents per one-way trip), while the intracommunity service is free. The RTA is currently accepting applications for participation in the Extra Lift program, in anticipation of the arrival of the lift-equipped buses with which service will be commenced.

8. The high priority given to work and training trips is in conformity with the requirement in part four of Appendix B to 23 C.F.R. §450 which provides that in establishing transit services for the mobility handicapped "[p]articular attention should be given to those handicapped persons who are employed or for whom the lack of adequate transportation constitutes the major barrier to employment or job training."

In its regulations defining the "special efforts" requirement of section 16(a) of the Urban Mass Transportation Act of 1964, the UMTA has included several examples of "a level of effort that will be deemed to satisfy this requirement [of special efforts] with respect to wheelchair users and semiambulatory persons." ¹⁰ Although these examples "are not

10. Appendix to Subpart B of Part 613 of 49 C.F.R., 49 C.F.R. §§613.200 - 613.204. This appendix in relevant part provides:

UMTA will not specify a program design to meet the "special efforts" requirement. However, the following examples are illustrative of a level of effort that will be deemed to satisfy this requirement with respect to wheelchair users and semiambulatory persons:

1. A program for wheelchair users and semi-ambulatory handicapped persons that will involve the expenditure of an average annual dollar amount equivalent to a minimum of five percent of the section 5 apportionment to the urbanized area....

2. Purchase of only wheelchair-accessible new fixed route equipment until one-half of the fleet is accessible, or, in the alternative, provision of a substitute service that would provide comparable coverage and service levels.

3. A system of any design, that would assure that every wheelchair user or semi-ambulatory person in the urbanized area would have public transportation available if requested for 10 round-trips per week at fares comparable to those which are charged on standard transit buses for trips of similar length, within the service area of the public transportation authority. The system could, for example, provide trip coupons to individuals who would then purchase the needed service.

These examples are illustrative of a level of effort that will satisfy the "special efforts" requirement. They are not regulatory standards or minimums, neither do they exhaust all valid approaches. They are meant to guide the development of local public transportation opportunities for wheelchair users and semiambulatory persons that in fact meet a significant fraction of the identified need within a reasonable time.

regulatory standards or minimums", they are indicative of levels and types of effort which the UMTA will accept in satisfaction of the mandate of section 16(a), and the court in its June 1 opinion therefore requested the parties to assess RTA's efforts in light of these examples. The court concludes, on the basis of the evidence and briefs submitted by the parties, that the CRT program meets both the UMTA's¹¹ first and third examples of satisfactory special efforts.

The first example in the UMTA Appendix defines satisfactory special efforts in terms of "[a] program for wheelchair users and semiambulatory handicapped persons that will involve the expenditure of an average annual dollar amount equivalent to a minimum of five percent of the section 5¹² apportionment to the urbanized area." Since the relevant "section 5 apportionment" for the Cleveland urbanized area

11. The second example, which involves the purchase of wheelchair-accessible fixed route equipment, is not argued to be applicable to the facts of this case. The federal and local defendants' argument concerning the applicability of the first and third examples is unrefuted in the briefs of the plaintiff.

12. The term "section 5 apportionment" as used in this example refers to the amount of federal assistance available to an urbanized area under section five of the Urban Mass Transportation Act, 49 U.S.C. §1604. These funds are allocated on the basis of population and population density.

for fiscal year 1977 is \$9,198,205, 41 Fed. Reg. 27230 (July 1, 1976), an expenditure of approximately \$460,000 would satisfy example one's guideline of five percent spending for "special efforts" programs. RTA's CRT program greatly surpasses this amount, however, since the authority's intra-community transit service is budgeted at one million dollars for its first year of operation, it is anticipated that one-half million dollars will be spent to operate the inter-community system in its first year, and the cost of the thirty vehicles slated for CRT under the challenged grant is \$847,000. RTA therefore clearly meets and surpasses the UMTA's first example of section 16(a) "special efforts."

The UMTA's third example of section 16(a) compliance is also met on this record. This example contemplates:

A system, of any design, that would assure that every wheelchair user or semi-ambulatory person in the urbanized area would have public transportation available if requested for 10 round-trips per week at fares comparable to those which are charged on standard transit buses for trips of similar length, within the service area of the public transportation authority....

The defendants anticipate that Extra Lift will provide just such service on a county-wide basis, while CRT's intra-community transit currently provides such transportation in a more limited geographic area. The fare for Extra Lift will be one-half that of the standard RTA fare, while the intra-community service of CRT is free. Thus the court finds that CRT satisfies the third UMTA example of section 16(a) "special efforts".

The court now concludes, after examining the additional documentary evidence submitted by the parties, that the Regional Transit Authority and the Urban Mass Transportation Administration are in full compliance with the Urban Mass Transportation Act of 1964, the Rehabilitation Act of 1973,¹³ and all regulations promulgated thereunder. The court is convinced that the efforts of RTA will result in transit comparability for the mobility handicapped "within a reasonable period of time" and finds no action of the UMTA to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Plaintiff cites this court to the approach of the Southern California Rapid Transit District to the provision of transportation for the mobility handicapped. Although this particular transit district chose to make its fixed route facilities fully accessible to the handicapped, this is not the only valid approach to meeting the federal mandate prohibiting discrimination against the

13. The court finds that these various provisions are all satisfied separately and independently of one another. Thus the fact that RTA's level of service for the mobility handicapped satisfies two of the three examples contained in the appendix to 49 C.F.R. §§613.200 - 613.204 is not considered determinative of whether or not the applicable statutes and other regulations have been complied with. On the total record in this case, however, the court concludes that all applicable statutory and administrative requirements have been met.

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elderly and handicapped. It is not the job of this court
to determine whether or not the defendants in this case
have adopted the "best" approach to the transit problems of
the mobility handicapped in the Cleveland area. 15
The
court can merely decide whether or not the defendants have
satisfied their statutory and regulatory obligations.

14. The court notes that the board of directors of the Southern California Rapid Transit District adopted its policy of total accessibility in October, 1974, but that the District does not expect the first phase of the implementation of its policy to begin before the end of 1977. This serves as a good example of the time necessary to implement any adequate transit program for the mobility handicapped and supports this court's conclusion that while substantial good faith efforts toward mass transit comparability have been mandated by Congress, instantaneous comparability is not required.

15. It is, indeed, misleading to classify any particular transit program as the "best" solution to the transportation needs of the elderly and handicapped, since the features of a particular approach that make it attractive to one segment of the mobility handicapped population may actually be disadvantageous to other handicapped persons. Some people may prefer total accessibility of fixed route equipment, while other mobility handicapped individuals may not only prefer, but require, curb to curb service. As the urban transportation planning regulations themselves provide, "[i]n carrying out planning for wheelchair users and semi-ambulatory persons, a range of alternative service improvements should be evaluated as to coverage, cost, and benefit." Handicapped and elderly associations and individuals were actively involved in the RTA evaluation and selection process which led to the adoption of the Community Responsive Transit program. Such a selection process is, of necessity, one for branches of government other than the judiciary.

Since the court finds that the defendants are in full compliance with all provisions of the applicable law, the defendants' motions for summary judgment are granted.

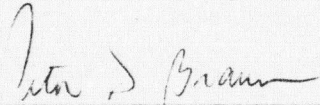
IT IS SO ORDERED.


United States District Judge

AFFIDAVIT OF SERVICE

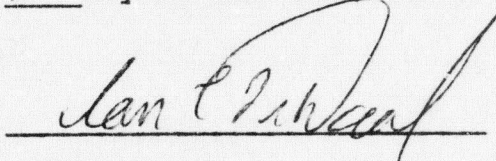
STATE OF NEW YORK) ss:
COUNTY OF MONROE)

On October 20, 1977, deponent served the within appellants' reply brief upon Glenn Wasserman, Esq. at the Urban Mass Transportation Administration, 400 7th Street, S.W. 9320 Nassif Building, Washington, D. C. 20590, the address designated by said attorney for that purpose by depositing a true copy of same in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service.



Peter D. Braun

Sworn to before me this
20 day of October, 1977.



IAN C. De WAAL
NOTARY PUBLIC, State of N. Y., Monroe County
My Commission Expires March 30, 1978

